No. 87-1328

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF ARIZONA

v.

ANGELENE TOCCO, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTION PRESENTED

Whether a party's (civil defendant's) Fifth and Fourteenth Amendment rights to due process are violated when a trial court enters an Order of Summary Judgment against a co-defendant and, as damages assessed against the co-defendant, orders the summary forfeiture of real property (another *in rem* party to the action) owned solely by the party, even though neither the party nor the *in rem* property are named in the motion itself, and the party-defendant could not reasonably infer that such a summary forfeiture would ensue from the plaintiff's Motion for Summary Judgment filed against the co-defendant.

PARTIES TO THE PROCEEDING

In addition to the named party, Joseph Frank Tocco was also a party in the trial court in the appeal to the Arizona Court of Appeals and in the Petition for Review to the Arizona Supreme Court.

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COURT OF APPEALS

Angelene Tocco, by and through counsel, petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals. A Petition for Review to the Arizona Supreme Court was rejected. The Arizona Supreme Court is the court of last resort in the State of Arizona.

DECISIONS BELOW

The Petition for Review to the Arizona Supreme Court was denied on October 15, 1987, and is attached as Exhibit A to the Appendix.

The memorandum decision of the Arizona Court of Appeàls was entered on May 19, 1987, and is attached as Exhibit B to the Appendix. The trial court's order of Partial Summary Judgment against Joseph Frank Tocco and One Parcel of Real Estate was filed on September 9, 1985, and is attached as Exhibit C to the Appendix.

JURISDICTION

On January 6, 1988 Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide:

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added).

AMENDMENT XIV (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

STATEMENT

This case arises out of a civil rack-eteering complaint (No. C 471228) filed on

October 2, 1982 against Petitioner, Angelene Tocco, an in rem defendant 3207 East Washington (owned at the time solely by Angelene Tocco), Joseph Frank Tocco (Petitioner's husband, but at all times relevant, legally separated from Petitioner), and approximately forty-eight other defendants. Previously, on September 20, 1982, a criminal information (CR-129027) was filed against co-defendant Joseph Frank Tocco. The information alleged one count of leading organized crime and other criminal activities.[1/]

In the criminal complaint, it was further alleged that unlawful activities occurred at the 3207 East Washington Street property (in rem civil defendant) owned by Petitioner Angelene Tocco.

1/ The organized crime count was dismissed by the trial court on the basis of unconstitutionality of the Arizona racketeering statute and was reversed by the Arizona Court of Appeals. Subsequently, the Arizona Supreme Court accepted co-defendant Tocco's Petition for Review, and the Court has not yet issued a decision.

Pursuant to a quit claim deed dated June 16, 1982 and recorded June 17, 1982, Petitioner Angelene Tocco became the sole owner of the property.[2/]

Subsequent to the filing of the civil complaint, co-defendant Joseph Frank Tocco was charged in three other criminal cases (Nos. CR 131139, CR 132559 and CR 136709).[3/] On or about November 14, 1983, co-defendant Joseph Frank Tocco pled guilty to most of the charges.[4/]

2/ This transaction took place before any civil or criminal complaints had been filed, and although one of the counts to the civil complaint alleges fraudulent conveyance from Joseph Frank Tocco to Angelene Tocco of the *in rem* civil defendant 3207 E. Washington property, there has yet to be a trial on such issue, and no determination of guilt has been made as to Angelene Tocco by any Court.

3/ The civil racketeering complaint was never amended to include these three criminal cases, or any specific actions arising out of such actions.

4/ On December 19, 1983, he moved to withdraw his pleas of guilty because they had not been entered into voluntarily, lacked his full knowledge and lacked his understanding. During the lengthy hearing on the motion to withdraw he claimed he was innocent of the charges and (cont. on page 6)

Counsel undersigned, together with co-counsel, Victor Aronow and Robert Hirsh, represented Joseph Frank Tocco in his motion to withdraw and an appeal regarding the pleas of guilty.

On or about February 26, 1985, a motion for partial summary judgment was filed by the State in the civil racketeering complaint against co-defendant Joseph Frank Tocco. Specifically, the State moved the trial court

> [f]or an order of partial summary judgment on the issue of Defendant Joseph Frank Tocco's liability for remedies arising out of his acts of racketeering and violation of A.R.S. §13-2313 for which he stands convicted in Maricopa County, Criminal No. CR 129027, CR 131139, CR 132559, and CR 136709, for the reasons set forth in the accompanying papers and statement of fact. (Emphasis added)

(See Clerk's Record on Appeal in Arizona Court of Appeals, Item 265, p. 1, ll. 19-26).

4/ (Continued) alleged ineffective assistance of counsel. The pleas were upheld and his Petition for Review to the Arizona Supreme Court was rejected.

The State's motion further read:

> Additional conduct constituting racketeering allegedly committed by Tocco and other defendants in this case is not the subject of this motion for partial summary judgment.

(See Clerk's Record on Appeal in Arizona Court of Appeals, Item 265, p. 4, ll. 7-9).

Nowhere in the title of the motion or in its contents is Petitioner, Angelene Tocco's name mentioned, or even alluded to. While the in rem defendant, 3207 E. Washington Street property, is mentioned in the Appendix A to the motion, entitled "disposition", such reference is only with respect to co-defendant, Joseph Frank Tocco's plea of guilty and sentencing regarding a criminal offense (prostitution) which allegedly took place on the property. (CR 129027). Not one of the five statement of facts, in support of the State's motion mentioned, or even implicitly alluded to Petitioner Angelene Tocco or the in rem defendant, 3207 E. Washington Street property.

(See page 11 of Item 265).

The State made it clear in its motion that the relief sought would only concern co-defendant, Joseph Frank Tocco, and even then, only the specific acts which he finally litigated, illustrated by the following references in the State's motion:

> The acts that Joseph Tocco has litigated to judgment in CR-129027, CR-131139, CR-132559 and CR-136709 include the following acts of racketeering, as listed in A.R.S. § 13-2301(D)(4):

(See Item 265, p. 9, ll. 9-12).

> His liability for acts of racketeering and violation of A.R.S. § 13-2312 has been established. The prayer for relief requests the following remedies that are relevant to the liability established:

Complaint Prayer for Relief

Paragraph	Relief
3	treble damages to victims.
4	joint and several liability for amount equal to gain.
5	forfeiture of enterprise assets 13-2312(A) (acquired or maintained).

6	forfeiture of enterprise assets 13-2312(B) (source of influence over).
7	forfeiture of proceeds and things used in racketeering.
8	receiver to collect and liquidate corporate property.
9	receiver to collect and liquidate forfeited property.
10	forfeiture of property in 12th and 13th Claims for Relief if no claim filed within 30 days.
11	setting aside fraudulent conveyances.
14	constructive trust for fraudulently conveyed property.
16	costs of investigation and prosecution.

The plaintiff therefore moves this Court to enter its order granting all of the above relief as it applies to the acts, assets, proceeds, things and costs involved in the conduct complained of that has been litigated to conclusion. Plaintiff also moves for a hearing or series of hearings to determine the particular assets, proceeds, things and costs involved.

(See pp. 9-10 of Item 265). (Emphasis added).

While Petitioner joined in co-defendant's motion to enlarge time for filing an objection to the State's Motion for Summary Judgment, counsel undersigned did not independently respond in writing to the motion because it clearly did not relate to Petitioner, Angelene Tocco, or other defendants. The State gave Petitioner notice in the motion itself that such was the case. (See supra).

At oral argument on June 3, 1985 general references were made to property of co-defendant Joseph Frank Tocco, and counsel for Angelene Tocco made it clear that she could not reasonably see how the motion against co-defendant could affect her client's property interests:

> THE COURT: Do you wish to speak to any of these issues?
>
> MS. SLATON: Just briefly, Your Honor.
>
> THE COURT: Since you've just joined, I thought perhaps you'd also coattail the arguments, but, if you want to ...
>
> MS. SLATON: I will just speak to just

> a few of them. The most pertinent to Angelene Tocco's civil case, Your Honor, is on page seven of the State's motion.5/ The State claims that somehow a motion for partial summary judgment would dispose of property issues regarding both Angelene Tocco and Joseph Tocco.
>
> Well, Your Honor, this partial motion for summary judgment is only pertaining to Joseph Tocco. Angelene Tocco is not included in the issues raised herein and I don't see how it would affect any of Angelene Tocco's property interests or any interests of even liability, Your Honor, in the suit and I assert it does not, on the basis of the brief before the Court.

(Transcript of oral argument, June 3, 1985, p. 15, ll. 17-25; p. 16, ll. 1-2). Further, it was made clear to the Court at oral argument that the Washington Street property itself was not co-defendant's property, but Petitioner, Angelene Tocco's property. (See Tr. June 3, 1985, at p. 34, ll. 20-21).

5/ Counsel misspoke, and was in actuality, referencing page seven of the State's response to Joseph Tocco's motion to stay for stay of the Partial Motion for Summary Judgment, which will be discussed infra.

In fact, it was assumed that additional hearings would take place to assess amounts of damages and specific assets to be assessed against co-defendant Joseph Frank Tocco. For example, see p. 11, ll. 2-4, of State's Motion for Partial Summary Judgment (Clerk's record, Item 265):

> Plaintiff also moves for a hearing or series of hearings to determine the particular assets, proceeds, things and costs involved.6/

The State's Motion for Partial Summary Judgment against co-defendant Joseph Frank Tocco was granted by the trial court's issuance of a minute order on June 18, 1985, in

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6/ This same language is included in the State's response to co-defendant Joseph Tocco's motion for stay:

> The denial of the stay, the granting of plaintiff's motion, the resulting award of the relief to which plaintiff is entitled, and the follow-up motions based upon the granting of Plaintiff's Motion for Partial Summary Judgment, should dispose of all the known available assets of Joseph and Angelene Tocco.

(Emphasis added). (See Clerk's record of Arizona Court of Appeals, Item 277, p. 7, ll. 11-16).

which the Court ordered the in rem defendant, 3207 East Washington property forfeit to the State. The order also provided for other money damages against co-defendant Joseph Frank Tocco.

The State submitted a proposed form of judgment on June 24, 1985, and on June 25, 1985 Petitioner filed objections to the form of judgment and a motion for reconsideration based upon the Fifth and Fourteenth Amendments of the United States Constitution, and alleged in her motion that the trial court's

> [o]rder goes beyond its proper jurisdiction and authority to rule on a property forfeiture of a third party [Angelene Tocco] even though: 1) There was no motion before the Court on such issue; 2) ANGELENE TOCCO had absolutely no due process of law before such forfeiture was ordered; and 3) ANGELENE TOCCO has had no trial before a jury on the merits of her civil racketeering case.

(See Clerk's Record on Appeal, Item 289, p. 3, ll. 1-7). Petitioner also attached the quit claim deed to the motion, substantiating that the Washington Street property was solely

owned by her. On July 1, 1985, Petitioner filed objections to the form of judgment, based upon the previous facts discussed herein. (See Clerk's Record on Appeal, Item 292). After oral arguments on July 25, 1985, the motion for new trial (filed by co-defendant), motion for reconsideration and objections to form of judgment were denied, and a formal judgment was entered, in which Petitioner's building was ordered forfeit to the State (See p. 37 of Exhibit C of Appendix). There were no findings of fact or conclusions of law mentioned regarding Angelene Tocco.

There were no findings of fact or conclusions of law regarding the source of funds used to purchase the building or property at 3207 East Washington Street. As mentioned earlier, there was no motion filed against the in rem defendant property itself or against Angelene Tocco. The entire motion and judgment were based upon the convictions of Joseph Frank Tocco in the criminal case.

The forfeiture of the in rem building was based upon the in personam criminal convictions of co-defendant Joseph Frank Tocco. The Petitioner, Angelene Tocco was not mentioned even in the factual bases of the criminal convictions of co-defendant Joseph Frank Tocco. The Petitioner was never charged in a criminal proceeding of any kind, in this case or any other case. Petitioner has yet, after five and one-half years, to be tried on any count of the State's civil complaint against her.

Subsequently, Petitioner filed a timely notice of appeal from the trial court's judgment. Petitioner was unable to post a supersedeas bond and when no Arizona Court would grant her relief, she filed a federal civil rights suit, in part, to obtain an order to enjoin the State from selling the property. (No. CIV 86-1168-PHX-PGK).

The federal district court granted Petitioner's injunction, and determined that the Arizona trial court had not made clear what portion of a supersedeas bond in the amount of $250,000 had to be posted on behalf of Petitioner. After the district court's order, Petitioner and the State entered into a stipulation that inter alia the building would not be sold until all appellate remedies, including those available at this Court, have been exhausted.[7/] This Petition for Certiorari follows.

7/ Subsequent to the Arizona Court of Appeals order affirming the trial court's judgment, attorneys' fees in the amount of approximately $19,504.00 have been assessed against Petitioner for her appeal. (See Order of Arizona Court of Appeals, filed on October 30, 1987). A Petition for Review of this separate order is presently pending in the Arizona Supreme Court. (See Arizona Supreme Court No. CV-87-0298-PR).

REASONS FOR GRANTING PETITION

The action of the Arizona trial court in acting beyond the scope of the motion before it, had the direct effect of denying Petitioner her Fifth and Fourteenth Amendment rights to due process. What has occurred here is a blatant summary taking of Petitioner's real property, without any trial, any hearings, or even the semblance of fair play. The scenario of facts which have occurred in the Arizona courts is outrageous in every respect. Petitioner has been the victim of nothing less than "short-cut" justice which must be corrected by this Court if the sacred ideals which are firmly embraced within the Fifth and Fourteenth Amendments will continue to have any vitality whatsoever in state courts.

Even though Petitioner cited many of this Court's precedents which clearly reflect the importance of property rights within the due process context, the Arizona Court of Appeals failed to cite even one of those

cases[8]/ in its memorandum decision, affirming the trial court's judgment. The action of the State and of the Arizona Courts in this case do not merely involve an in rem piece of property, but involve the long-adhered to personal right of Angelene Tocco as owner of such property.

As Justice Stewart opined in this Court's decision of Lynch et al., v. Household Finance Corp., 405 U.S. 538, 552 (1972):

> The federal courts have been particularly bedeviled by 'mixed' cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a good example of the conceptual difficulties created by the test.
>
> Such difficulties indicate that the dichotomy between personal

8/ Fuentes v. Shevin, 407 U.S. 67 (1972); Carey v. Piphus, 435 U.S. 245 (1978); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975); Regional Rail Reorganization Act Cases, 419 U.S. 107 (1974).

> liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries *138-140. Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343 (3). We do no more than reaffirm the judgment of Congress today. (Footnotes omitted).

Yet, in flagrant disregard of this Court's recognition of the personal constitutional right inherent in a person's interest in property, the State has summarily forfeited Petitioner's property, and the Arizona courts have passively sat back and permitted this to take place.

In Goldberg v. Kelly, supra, Justice Brennan addressed the due process implications in a decision by a fact-finder which is not strictly based upon evidence presented at a hearing:

> [T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937); United States v. Abilene & S. R. Co., 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.

397 U.S. at 271. See also, In re Japanese Electronic Products Antitrust Lit., 631 F.2d 1069, 1084 (3rd Cir. 1980). As demonstrated herein, the trial court's judgment forfeiting Petitioner's property was not based upon any facts or law adduced at the hearing that gave Petitioner notice of such action.

In Jimenez v. Tuna Vessel Granada, 652 F.2d 415 (5th Cir. 1981), the Fifth Circuit held that the defendant's procedural due process had been violated where (in an admiralty case) a finding of unseaworthiness was entered by the trial judge on unpled issues. There, the Fifth Circuit held that the trial court abused its discretion when it determined that unpled issues, on which it ruled against the defendant, were tried by implied consent.

Quoting Professor Wright, Wright & Miller Federal Practice and Procedure, Civil § 1471, the Court stated:

> As Professor Wright notes, the free amendment features of Rule 15, Federal Rules of Civil Procedure, are designed to facilitate decision of claims on their merits rather than on procedural technicalities. One of the rule's more salutory features is found in the opening sentence of its subparagraph (b): 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.' So we avoid a parsing of the pleadings by the losing party in hopes that

> some issue, patently tried out with the knowledge of all, was not raised in them. The coin has another side, however; each party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere. (Footnote omitted).

652 F.2d at 420. In explaining its holding, the Court concluded:

> In closing, we express our sympathy with the situation of the trial court, faced as it was with many hundreds of cases to dispose of within a time frame dictated by foreign policy considerations and neither of its choosing nor within its control. Nor was the manner in which counsel conducted trial preparations impeccable; a degree of impatience, even exasperation, on the part of the judge is understandable. Nor do we now hold that the grounds upon which the Court rested its judgment were necessarily erroneous, a question that we need not and do not reach. We hold only that trial of unpled issues by implied consent is not lightly to be inferred under Rule 15(b), that such inferences are to be viewed on a case-by-case basis and in light of the notice demands of procedural due process, and that, so tested, fair notice is not present here. (Footnote omitted)

652 F.2d at 422. See also, Jefferson Fourteenth Assoc. v. Wometco De Puerto Rico, 695 F.2d 524 (11th Cir. 1983). So too, in the present case, Petitioner submits she received no notice that her property would be held forfeit to the State resulting from a judgment on a motion against her co-defendant, even though neither Petitioner nor the in rem property defendant had been given a trial on the merits.[9/] See, Ivory Ranch, Inc. v. Quinn River Ranch, Inc., 705 P.2d 673 (Nev. 1985); Domar Ocean Transp. v. Independent Refining Co., 783 F.2d 1185 (5th Cir. 1986).

As mentioned earlier, the entire Partial Motion for Summary Judgment, filed against co-defendant, was premised upon his pleas of guilt and conviction. Because

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9/ Due process concerns should be heightened within a forfeiture context, because such remedies go beyond general civil practice. United States v. $39,000 In Canadian Currency, 801 F. 2d 1210, 1218 (10th Cir. 1986), and cases cited therein.

neither Petitioner nor her in rem property were parties to the criminal proceedings upon which the State based its motion, Petitioner could not be precluded from subsequently contesting the issues on the merits in the civil case. She had a right to expect a trial before her property interests could be taken from her. General Foods v. Mass. Dept. of Public Health, 648 F.2d 784 (1st Cir. 1981).

Finally, this was not a case where a motion for partial summary judgment for forfeiture was filed against the in rem defendant property based upon illegal acts which took place on the premises. Similarly, this was not a motion for partial summary judgment filed against Petitioner Angelene Tocco requesting a finding of liability against her with a simultaneous request for damages based upon the finding of fact.

The judgment forfeited Petitioner's solely owned property to the State as damages against co-defendant for his prior convictions,

which allegedly precluded him from subsequently denying the same facts in his civil racketeering case. Thus, the forfeiture was based solely on an in personam, as opposed to an in rem basis. See Black's Law Dictionary [Rev. 4th Ed. 1976]. The forfeiture which occurred on Petitioner's property was tantamount to a criminal forfeiture which is imposed as a sanction against a defendant upon his conviction. United States v. $39,000 In Canadian Currency, supra, 801 F.2d at 1218-1219.

Yet, the record is clear that at no juncture in the State's moving papers, at the hearing, or in the judgment itself was any factual history done regarding 1) the proceeds used to acquire the building; 2) the legitimacy of title; 3) any wrongdoing on the part of Angelene Tocco, as a recorded owner, or other relevant data. See United States v. Lot No. 50 as Shown on Map of Kingsley, 557 F. Supp. 72 (D. Nev. 1982). Furthermore,

these issues were never even addressed by the State or the Court. Thus, not only was the drastic action of the trial court based upon issues of which Petitioner had no notice, but absolutely no evidentiary safeguards were adhered to upon the issuance of the forfeiture judgment against Petitioner's ownership interest in the in rem property.

The Arizona Court of Appeals decision ignored the flagrant violations of Petitioner's due process rights and merely noted:

> The record shows that Angelene Tocco and the Property were joined as parties and were represented in the trial court. Angelene Tocco and the Property properly noticed their appeal in this matter separate and apart from the notice of appeal filed by Joseph Tocco. Further, the complaint filed in this matter named her; the complaint was served personally on her and specifically requested the forfeiture of the Property; she was personally served a notice of pending forfeiture; she was personally served with the motion for partial summary judgment which requested the forfeiture of the Property; she was represented by counsel at the hearing on the motion for partial summary judgment, after a continuance was

> granted by the trial court in order for her counsel to evaluate whether she wished to contest the motion 'as a party'; at the hearing on the motion for partial summary judgment, she explicitly joined in Joseph Tocco's response and other arguments, arguing separately and at length against the motion; and she made a motion for reconsideration of the partial summary judgment and filed an objection to the form of judgment. Thus, the record shows that Angelene actively participated in the trial court.

(See Exhibit B of Appendix at pp. 27-28).

This reasoning by the Arizona Court of Appeals renders the due process notice requirement in pleadings meaningless. Such reasoning merely indicates that the Arizona courts approve of any action against a party, whether justified or unjustified, as long as that party is present in the proceedings. Thus, the decision totally disregards all notice requirements, as explained earlier herein.

The fact that, as a party to the underlying action itself, Angelene Tocco appeared at the hearing on the motion for partial summary judgment filed against a co-defendant

and filed a notice of appeal, could not possibly waive her right to a trial on the merits. Yet, under the reasoning of the Court of Appeals, this is precisely the result of such an appearance.

Clearly, the entire motion was based upon the conduct and liability for remedies of Joseph Frank Tocco, and was to have applied only to those issues duly litigated to conclusion. It is undisputed that Angelene Tocco did not, and logically could not have litigated any of the alleged acts against Joseph Tocco to conclusion. Further, none of the Statement of Facts contained in the State's motion mentioned, or even related to, Angelene Tocco. Under such circumstances it is entirely unreasonable to have required Angelene Tocco to take any action whatsoever. An examination of the lower court's judgment reveals it is completely devoid of any reference to Petitioner, Angelene Tocco or any findings of fact or conclusions of law as to her relationship to

the motion filed against a co-defendant.

What has happened to Petitioner, Angelene Tocco, in the Arizona courts is shocking to all recognized concepts of due process, as enunciated by this Court throughout history. It is even more shocking to Petitioner that the Arizona courts would intentionally disregard this Court's strong mandate that a person's property rights are sacred within the Fifth and Fourteenth Amendment context. (See cases cited supra).

This Court must grant certiorari on the facts presented herein. The State of Arizona has been permitted to use its police power in an irresponsible manner, and has blatantly cast aside the United States Constitution in its zealous efforts to enforce the "law". The Arizona courts have been unwilling to stop such tactics, and have permitted the State to seize the property of Petitioner without being required to adhere to her rights under the Fifth and Fourteenth Amendments.

Petitioner calls upon this Court of last resort to grant her relief. This Court has firmly held that due process protections under the Fifth Amendment of the Constitution must override any expediencies in government procedures when the two interests conflict. In Stanley v. Illinois, 405 U.S. 645, 656 (1972), in the context of custody proceedings, Justice White stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [footnote omitted] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disclaims present realities in deference to past formalities, it needlessly

> risks running rough shod over the important interests of both parent and child. It therefore cannot stand.

See Fuentes v. Shevin, supra, 407 U.S. at 90 n. 22 (1972) quoting Stanley v. Illinois, supra; See also, Bell v. Burson, 402 U.S. 535, 540-541 (1971); Goldberg v. Kelly, supra, 397 U.S. at 261 (1970). In Petitioner's case, the argument that due process is outweighed by the need for efficiency in crime fighting is even weaker, since there is lacking here even the "deference to past formalities" which was present in Stanley v. Illinois, supra. Without question, the State's actions in the present case ran "rough-shod" over Petitioner because she was deprived of her valuable property without any semblance of due process whatsoever.

Unless this Court steps in to review the issue presented, the State of Arizona will have succeeded, with the approval of the Arizona courts, in forfeiting Petitioner's

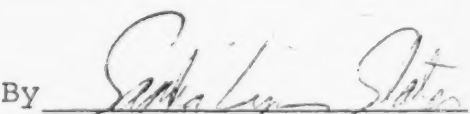
property in clear violation of her rights to due process, as presented herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 4th day of February, 1988.

SLATON LAW OFFICES

By 
Sandra Lynn Slaton
Attorneys for
Petitioner
Angelene Tocco

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. 87 1328

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF ARIZONA

v.

ANGELENE TOCCO, PETITIONER

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

SLATON LAW OFFICES
SANDRA LYNN SLATON
234 N. Central Avenue
Suite 305
Phoenix, Arizona 85004
(602) 254-7774
Attorneys for Petitioner
Angelene Tocco

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF ARIZONA

v.

ANGELENE TOCCO, PETITIONER

APPENDIX TO
PETITION FOR A WRIT
OF CERTIORARI TO THE ARIZONA
COURT OF APPEALS

SLATON LAW OFFICES
SANDRA LYNN SLATON
234 N. Central Avenue
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Attorneys for Petitioner
Angelene Tocco

October 15, 1987

RE: STATE OF ARIZONA/ROBERT K. CORBIN
vs. ANGELENE TOCCO and JOSEPH TOCCO
Supreme Court No. CV-87-0298-PR
Court of Appeals No. 1 CA-CIV 8652
Maricopa County No. C-471228

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 14, 1987, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Awarding attorney's fees pursuant to A.R.S. § 13-2314(D)(5) subject to proper statement being filed pursuant to Rule 21(c)(2) ARCAP.

Record returned to the Court of Appeals, Division One, Phoenix, this 15th day of October, 1987.

DAVID R. COLE, Clerk

TO:
Sandra L. Slaton, Esq., Slaton Law Offices, 234 N. Central, Suite 305, Phoenix, AZ 85004

EXHIBIT A

Victor Aronow, Esq., 217 Luhrs Tower, 45 W. Jefferson, Phoenix, AZ 85003

Hon. Robert K. Corbin, Attorney General, 1275 W. Washington, Phoenix, AZ 85007 - Attn: Patrick M. Murphy, Esq., Cameron H. Holmes, Esq., and Joseph M. Hennelly, Jr., Esq.

Glen D. Clark, Clerk, Court of Appeals, Division One, West Wing, State Capitol, 1700 W. Washington, Phoenix, AZ 85007

jeh

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. ROBERT K. CORBIN, Attorney General, Plaintiff-Appellee, v. ANGELENE TOCCO and JOSEPH TOCCO, Defendants-Appellants.	1 CA-CIV 8652 DEPARTMENT D MEMORANDUM DECISION (Not for Publication; Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of
Maricopa County

Cause No. C-471228

The Honorable Edward C. Voss, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
By Patrick M. Murphy, Chief Counsel
Financial Fraud Division
Cameron H. Holmes
Joseph M. Hennelly, Jr.
Assistant Attorneys General
Attorneys for Plaintiff-Appellee Phoenix

Slaton Law Offices
By Sandra Lynn Slaton
Attorney for Defendant-Appellant
Angelene Tocco Phoenix

EXHIBIT B

Victor A. Aronow Phoenix
Attorney for Defendant-Appellant Joseph Tocco

EUBANK, Presiding Judge

Appellants, Joseph and Angelene Tocco, appeal from a partial summary judgment in favor of the State of Arizona arising out of a civil racketeering complaint filed by the State seeking remedies, pursuant to A.R.S. § 13-2301, et seq., the Arizona Racketeering Act, and A.R.S. § 13-106.

The issues presented in this appeal are numerous. Primarily, appellants contend that the relief granted by the trial court was outside the scope of the pleadings, that A.R.S. § 13-2314(F)[now (G)] is unconstitutional, and that forfeiture of the real property was unconstitutional.[1]

---

[1] We note that the State answered appellants' arguments by what appears to be on a priority-of-arguments basis. In the future, if answering counsel deems such an answer appropriate, we suggest that the answering brief set out a clear "roadmap" stating which opening argument is being answered. The answering brief, though substantially well-done, was very difficult for the court to follow because it went its own way.

I. BACKGROUND AND FACTS

The facts are not in dispute. On October 5, 1982, the State filed and served the civil complaint involved herein, pursuant to the Arizona Racketeering Act (RICO). A.R.S. §§ 13-2301, et seq. and A.R.S. § 13-106. This complaint named as defendants Angelene and Joseph Tocco, numerous other individuals and entities, and several parcels of real estate as in rem defendants, including the property located at 3203-3207 East Washington, Phoenix, Arizona (Property).

The complaint alleges the existence of various criminal enterprises (theft, prostitution, robbery, fraudulent schemes and artifices, usury, extortion and others) and provides by way of example and without limitation, numerous specific instances of racketeering violations by Joseph Tocco and

others. It also specifically alleges that Joseph Tocco committed acts of racketeering at the Property, including prostitution, usury and theft enterprises, and seeks the forfeiture of the Property because of its use in racketeering acts, in the various illegal enterprises and because the Property was maintained by acts of racketeering or afforded a source of influence over the racketeering enterprises. The prayer for relief in the complaint seeks, inter alia, treble damages for all persons injured by reason of defendant's acts of racketeering and the forfeiture of property, including the Property.

On December 21, 1982, the State filed an amended information in CR-129027 against Joseph Tocco which included illegal conduct of an enterprise, conspiracy to pander and receive the earnings of a prostitute, obstructing criminal investigation or prosecution, filing false sales tax returns,

conspiracy to engage in fraudulent schemes, conspiracy to commit burglary and theft. These charges involve multiple crimes which are not necessary to detail here.

On January 11, 1983, Joseph Tocco was indicted in Maricopa County Superior Court, CR-131139, for conspiracy to commit theft and defrauding an insurance company. This indictment dealt with criminal activity which began in January of 1975 and which concerned the defrauding of Jeweler's Mutual Insurance Co., by staging an armed robbery. On March 23, 1983, Joseph Tocco was indicted in Maricopa County Superior Court, CR-132559, for conspiracy to commit theft and theft involving a front end loader. This indictment dealt with criminal activity which began on September 9, 1982 and involved defrauding of the Fireman's Fund Insurance Co., by staging the theft of the equipment. On October 24, 1983, Joseph Tocco was indicted in Maricopa County

Superior Court, CR-136709, for influencing and tampering with two witnesses, in addition to tampering with the three witnesses alleged in CR-129027.

On November 14, 1983, Joseph Tocco entered into plea agreements in connection with all of the pending criminal cases. He pled guilty to a total of nineteen felony counts from four of the cases. In consideration for the guilty pleas, all counts of a fifth case, CR-135944, were dismissed and he received immunity from state or federal prosecution on seventy-nine other criminal offenses and events listed.

On February 28, 1985, the State filed its motion for partial summary judgment in the instant case. This motion sought remedies, pursuant to A.R.S. § 13-2314 and § 13-106, arising out of the racketeering acts of Joseph Tocco for which he was convicted in criminal cases CR-129027, CR-131139,

CR-132559 and CR-136709. That motion set out the specific prayers for relief in the complaint and thereafter requested that the court enter an order granting all of the relief requested in the complaint, including in rem forfeiture, as it applied to the racketeering acts, assets, proceeds, things and costs involved in the conduct complained of that had been litigated to conclusion. In appendices to that motion, the State specifically set out the relationship between the motion for partial summary judgment, the criminal convictions of Joseph Tocco, and the relief requested in both the motion and in the complaint.

On March 5, 1985, Joseph Tocco filed a motion to enlarge time to file a response based on his counsel's trial schedule. On March 14, 1985, Angelene Tocco filed a notice of joinder in Joseph Tocco's motion to enlarge time in which to file a response to the motion

for summary judgment. The reason stated in that motion was that counsel for Angelene Tocco needed additional time to do a detailed review of the issues raised in the motion for summary judgment and to evaluate any issues which she "wish[ed] to contest as a party in this matter." On May 3, 1985, Joseph Tocco filed a memorandum in opposition to the motion for summary judgment, and in support of a motion for stay of the proceedings. At oral argument on the motion on June 3, 1985, Angelene Tocco joined in Joseph Tocco's opposition memorandum and argument. The trial judge specifically acknowledged Angelene's presence and granted her request to join and concur in all of Joseph Tocco's arguments. Joseph Tocco's response, in which Angelene Tocco joined, relied exclusively on legal arguments and raised no issues of fact and presented no affidavits. On June 18, 1985, the court issued a minute entry which granted

the State's motion for partial summary judgment.

On June 24, 1985, the State submitted a proposed order of partial summary judgment. Joseph and Angelene Tocco then filed a motion for reconsideration of the partial summary judgment. In addition, there were objections to form of judgment, filed on July 1, 1985, by Angelene Tocco; a motion for new trial was filed on July 8, 1985, by Joseph Tocco; and objections to form of judgment were filed by Joseph Tocco on July 15, 1985. The court held oral argument on these motions on July 25, 1985. Counsel for Angelene Tocco argued and presented objections to the partial summary judgment relating only to Joseph Tocco, as well as those relating to both Joseph and Angelene. These pending motions were denied by the trial judge, and on September 9, 1985, a formal partial summary judgment, containing Rule 54(b) language, against Joseph Tocco and One Parcel of Real Estate (the Property, 3203-3207

E. Washington) was entered. The order found, inter alia, that Joseph Tocco was liable for $273,354.90 as treble damages to the two insurance companies which were the victims of the crimes in CR-131139 and CR-132559. The Property was forfeited to the State based on the conviction of Joseph Tocco in CR-129027; this forfeiture was not based on the other convictions.

The Toccos' timely filed their notice of appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-2101 and 12-120.21.

II. ISSUES

Appellants contend the following:

1) The order and judgment with regard to CR-131139 is void.

2) The order and judgment with regard to CR-132559 is void.

3) The order and judgment of forfeiture of the real property is void.

4) Arizona Revised Statutes, Section 13-2314(F)[now (G)] is unconstitutional in that it deprives appellant Joseph Tocco of due process and violates art. 2, § 16 of the Arizona Constitution.

5) The trial court's conclusions with regard to estoppel were erroneous as a matter of law, and requires that the judgment be vacated.

6) The order of forfeiture is void because it deprives the owner of Property, Angelene Tocco, of due process because the court acted beyond the scope of its authority.

III. DISCUSSION

A. The void judgments.

Appellants contend that the orders and judgments with regard to CR-131139, CR-132559 and the forfeiture of the property are void. Appellants argue that the complaint was never amended to incorporate the criminal acts specified in CR-131139 and CR-132559. Appellants conclude, therefore, that because

a party is bound by its pleadings, the State is bound by the specific allegations of the RICO complaint. The State responds with three separate arguments. First, Arizona is a notice pleading state and, therefore, extensive fact pleading is not required. Rosenberg v. Rosenberg, 123 Ariz. 589, 601 P.2d 589 (1979); Folk v. City of Phoenix, 27 Ariz. App. 146, 551 P.2d 595 (1976). Second, the appellants consented, by implication, to incorporation of the theft issues raised in CR-131139 and CR-132559 and, thus, failure to amend the complaint does not affect the consideration of these issues. Rule 15(b), 16 A.R.S., Rules of Civil Procedure; see Hayes v. Philadelphia Transportation Co., 312 F.2d 522 (3rd Cir. 1963). Third, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the pleadings. Rule 54(b), 16 A.R.S., Rules

of Civil Procedure; Earven v. Smith, 127 Ariz. 354, 626 P.2d 41 (App. 1980).

While we agree with all three arguments, we find the first argument most persuasive. Pleadings need only give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved; technicalities are to be avoided. Guerro v. Copper Queen Hospital, 112 Ariz. 104, 537 P.2d 1329 (1975); Mackey v. Spangler, 81 Ariz. 113, 301 P.2d 1026 (1956). The complaint generally alleges conduct including, without limitation, theft. Appellants had fair notice that the nature and basis of the State's civil racketeering complaint encompassed the acts to which Joseph Tocco entered his pleas of guilty to CR-131139 and CR-132559.

Appellants also state that the allegations in the complaint were specific, particular and limited, thus the specific

allegations bind the State. The cases cited by appellants are personal injury negligence cases. See e.g., Pacific Greyhound Lines v. Uptain, 81 Ariz. 359, 306 P.2d 281 (1957). This distinction between the use of general and specific allegations appears to be important only in res ipsa loquitur doctrine applications. See Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934). In any event, we express no opinion on that application but find that the liberal notice pleading rules were not violated in this case.

Appellant makes two additional arguments essentially rephrasing the argument that the State made specific allegations and was therefore bound by those specific allegations. The appellants claim that the motion for partial summary judgment only requests a finding of liability and no monetary or forfeiture relief was requested. There is no merit to this argument. The motion

for partial summary judgment carefully requested and itemized the relief sought in the complaint. Also, appellant states that the judgment is void because the findings that are the basis for the judgment are beyond the pleadings. Similarly, there is no merit to this argument. As stated above, the pleadings gave the required notice pursuant to the liberal notice pleading requirements in this State. Rosenberg v. Rosenberg, 123 Ariz. 589, 601 P.2d 589 (1979); Smith, Arizona Civil Trial Practice, § 192 (1986).

Appellants also argue that the forfeiture of the property was not requested and that their arguments with respect to CR-131139 and CR-132559 are also applicable to this issue. Both the complaint and the motion for partial summary judgment requested forfeiture of the property. Therefore, this argument is also meritless.

In sum, the complaint gave appellants

sufficient notice concerning the nature and basis of the claim of civil racketeering injuries, and the remedies prayed for were based on the offenses to which Joseph Tocco entered pleas of guilty. We see no error or prejudice.

B. Constitutionality of A.R.S. § 13-2314(F).

Appellants contend that A.R.S. § 13-2314(F) (now (G) but referred to hereafter as (F)) deprives appellant Joseph Tocco of due process of law and violates art. 2, § 16 of the Arizona Constitution. We disagree.

A.R.S. § 13-2314(F) provides:

> A defendent convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purpose of this subsection, a conviction may result from a verdict or plea including a no contest plea.

Appellants contend that the term "essential allegations" is vague because the term is not defined; thus, the statute is unconstitutional. Appellants also contend that A.R.S. § 13-2314(F) creates an irrebutable presumption which is impermissible because it violates the due process clause of the fourteenth amendment to the United States Constitution.

Appellants correctly argue that the void for vagueness doctrine applies in civil as well as criminal cases. Boutilier v. Immigration Services, 387 U.S. 118, 87 S. Ct. 1563, 18 L.Ed.2d 661 (1967); Small Co. v. American Sugar Refining Co., 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925). However, Boutilier, supra, makes it clear that the doctrine does not apply where a statute does not impose a regulation or sanction on conduct. 387 U.S. AT 123. See

also, Cavco Industries v. Industrial Commission, 129 Ariz. 429, 631 P.2d 1087 (1981). Moreover, there exists a strong presumption supporting the constitutionality of a statute and the burden rests on the party challenging the validity of a statute to establish that it is unconstitutional. State v. Walton, 133 Ariz. 282, 289, 650 P.2d 1264, 1271 (App. 1982).

A.R.S. § 13-2314(F), does not impose a regulation or sanction on conduct. In effect, all that A.R.S. § 13-2314(F) causes to occur is the effective use of judicial resources by precluding inconsistent factual determinations in civil and criminal proceedings based on the same facts established in the prior criminal proceeding.

We note the term "essential allegations" is the same term used in 18 U.S.C. § 1964(d) (federal RICO) and 18 U.S.C. § 3580(e) (Victim and Witnesses Protection Act).

Specifically, 18 U.S.C. § 3580(e) has withstood constitutional attack with courts stressing the general rule that criminal convictions may be accorded collateral estoppel, or issue preclusion effect as to issues raised in a subsequent civil suit. United States v. Keith, 754 F.2d 1388 (9th Cir. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 93, 88 L.Ed.2d 76 (1985); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 105 S. Ct. 2362, 86 L.Ed.2d 262 (1985); United States v. Brown, 744 F.2d 905 (2d Cir. 1984), cert. denied, 469 U.S. 1089, 105 S.Ct. 599, 83 L.Ed.2d 708 (1985). We agree. Moreover, "essential" is defined as requisite or indispensibly necessary. Black's Law Dictionary, 642 (4th ed. 1968). Thus, the essential facts to establish the allegations would be precluded. In State v. Williams, 141 Ariz. 127, 685 P.2d 764 (App. 1984), we pointed out that "essential

element" for Rule 405(b), Arizona Rules of Evidence, means the operative facts which determine the rights and liabilities of the parties. We hold the term "essential allegations" is not vague. It includes the allegations of the pleadings, the plea agreement and the factual basis of the guilty plea. Rule 17.3, Arizona Rules of Criminal Procedure. Cf. State v. Ybarra, 149 Ariz. 118, 716 P.2d 1055 (App. 1986).

Next, appellants argue that A.R.S. § 13-2314(F) creates an irrebutable presumption which violates the due process clause. See State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954). Although irrebuttable presumptions are constitutional if there is a rational basis for its categorical inclusion of Fact B from Fact A, see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976), we believe appellants misstate the use of presumptions. An

irrebuttable presumption requires the proof of Fact B, without rebuttal, from the proof of Fact A. In the instant case Fact A is proven by appellant Joseph Tocco's guilty plea and the same Fact A is precluded in this subsequent civil proceeding. Thus, there is no irrebuttable presumption which must pass constitutional muster.

Appellants also raise a novel state constitutional argument. Article 2, § 16 of the Arizona Constitution provides:

> No conviction shall work corruption of blood or forfeiture of estate.

Appellants claim that A.R.S. § 13-2314(F) creates an unbreakable link between itself and the other provisions of A.R.S. § 13-2314 which provide for forfeiture in which the "forfeiture of estate" occurs.

The State correctly points out that "forfeiture of estate" is a vestige from feudal times. Essentially, "forfeiture of estate" was a necessary consequence of a felony

in the feudal context where the punishment was generally death and reassignment of the estate of the culprit to others was required. A felony occasioned a total forfeiture of either lands or goods or both. See U.S. v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980), cert. denied, 449 U.S. 919, 101 S. Ct. 317, 66 L.Ed.2d 146 (1980). Contemporary federal and state forfeiture statutes reach virtually any type of property that is used in the conduct of a criminal enterprise. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683, 94 S. Ct. 2080, 2092, 40 L.Ed.2d 452, 468 (1974); United States v. Thevis, 474 F.Supp. 134, 140-141 (1979), aff'd, 665 F.2d 616 (5th Cir. 1982), cert. denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). In short, the prohibition of "forfeiture of estate" contemplates protection from a forfeiture of all of one's property solely because of his or her conviction of

a felony, regardless of a connection between the crime or crimes and the property involved. The forfeiture of property involved here was used in the conduct of a criminal enterprise pursuant to A.R.S. § 13-2312. Since "forfeiture of estate" is not involved here, no violation of art. 2, § 16 has occurred and appellants' arguments on the scope of such a forfeiture need not be discussed.

Two federal cases support our conclusion. U. S. v. Grande, 620 F.2d at 1037-39, and U.S. v. Thevis, 774 F. Supp. at 140-141, discussed the effect of 18 U.S.C. § 3563 (repealed effective Nov. 1, 1986), which provided the same protections as art. 2, § 16, in the federal RICO forfeiture provisions set out in 18 U.S.C. § 1963. Both courts held that the forfeiture of property utilized to violate the criminal law was not "forfeiture of estate." We agree.

C. Collateral Estoppel.

Appellants argue that as a matter of

law the "conclusions of law" portion of the order for partial summary judgment are in error. Appellants stress that the "actually litigated" language in section 27 of the Restatement of Judgments, Second, precludes a collateral estoppel (or issue preclusion) effect in this case. Section 27 states:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Appellants contend that since appellant Joseph Tocco pled guilty, as opposed to going to trial, there is no preclusive effect to be given in favor of the State and against appellants because the facts were not "actually litigated." We disagree.

Appellants' argument ignores the application of A.R.S. § 13-2314(F), which entirely omits the "actually litigated" language. A.R.S. § 13-2314(F) codifies the collateral

estoppel principle and, more importantly, specifically provides for the conclusive effect to be applied to "a conviction [which] may result from a verdict or plea including a no contest plea" (emphasis added). Furthermore, appellant, Joseph Tocco's plea agreement expressly provided for preclusion. It states:

> This plea bargain agreement in no way compromises any forfeiture proceeding pursuant to A.R.S. § 36-1041 through 36-1048 or A.R.S. § 32-1993, if applicable, or civil actions pursuant to A.R.S. § 13-2301 et seq., or other types of forfeiture pursuant to A.R.S. § 13-106. This plea bargain agreement in no way abrogates the provisions of A.R.S. § 13-2314(F).

(Emphasis added.) Thus, the preclusive effect of A.R.S. § 13-2314 was part and parcel of Tocco's plea agreement.

Further, appellants cite Bower v. O'Hara, 759 F.2d 1117 (3rd Cir. 1985), in support of their argument on the lack of actual litigation. Simply, the case law cited by appellants is not applicable to A.R.S. § 13-2314

(F). The plain wording of the statute controls.

D. Due Process Afforded Angelene Tocco.

Appellant, Angelene Tocco argues that because the motion for partial summary judgment failed to mention or allude to Angelene Tocco in any manner whatsoever, the court had no authority to forfeit her interest in the Property to the State. Thus, she argues, that she was not afforded due process consistent with the requirements of the 5th and 14th amendments to the United States Constitution, when the trial court forfeited the Property to the State, pursuant to A.R.S. §§ 13-106 and 13-2314. We disagree.

The record shows that Angelene Tocco and the Property were joined as parties and were represented in the trial court. Angelene Tocco and the Property properly noticed their appeal in this matter separate and apart from the notice of appeal filed by Joseph Tocco. Further,

the complaint filed in this matter named her; the complaint was served personally on her and specifically requested the forfeiture of the Property; she was personally served a notice of pending forfeiture; she was personally served with the motion for partial summary judgment which requested the forfeiture of the Property; she was represented by counsel at the hearing on the motion for partial summary judgment, after a continuance was granted by the trial court in order for her counsel to evaluate whether she wished to contest the motion "as a party"; at the hearing on the motion for partial summary judgment, she explicitly joined in Joseph Tocco's response and other arguments, arguing separately and at length against the motion; and she made a motion for reconsideration of the partial summary judgment and filed an objection to the form of judgment. Thus, the record shows that Angelene actively participated in the trial court.

Finally, we note that A.R.S. § 13-106

(now repealed, see A.R.S. § 13-4301, et seq.) provides a claim procedure, with a hearing within 48 hours, for any person claiming a lawful interest in the property subject to forfeiture. Angelene Tocco neither requested a hearing nor made a claim to the Property as the lawful owner.

On this record, Angelene Tocco was afforded substantial opportunity to be heard and was, in fact, heard. Generally, a denial of due process is a denial of fundamental fairness, shocking to a universal sense of justice. Oshrin v. Coulter, 142 Ariz. 109, 688 P.2d 1001 (1984). No such denial of due process occurred in this instance. A.R.S. § 13-2314 provides for the forfeiture of property connected with racketeering offenses. Cf. State v. Henderson, 149 Ariz. 254, 717 P.2d 933 (App. 1986).

IV. CONCLUSION

In sum, we conclude that the six contentions of appellants all fail. The

respective orders and judgments are not void; A.R.S. § 13-2314(F) (now (G)) is constitutional; the conclusions of law made pursuant to A.R.S. § 13-2314(F) were proper; and, finally, Angelene Tocco was not deprived of due process of law because of improper procedural treatment.

The judgment is affirmed.

/s/ William E. Eubank
WILLIAM E. EUBANK
Presiding Judge

CONCURRING:

/s/ Sarah D. Grant
SARAH D. GRANT
Judge

/s/ Levi Ray Haire
LEVI RAY HAIRE
Judge

2573c:FFD81-271
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, ex rel. ROBERT K. CORBIN, Attorney General, Plaintiff, vs. JOSEPH FRANK TOCCO, et al., Defendant.	NO. C 471228 ORDER OF PARTIAL SUMMARY JUDGMENT AGAINST JOSEPH FRANK TOCCO AND ONE PARCEL OF REAL ESTATE (Judge Edward C. Voss)

Plaintiff, State of Arizona, having filed a Complaint alleging that Joseph Frank Tocco violated the Arizona Racketeering Act, A.R.S. §§ 13-2301 et seq., and that the real estate known as 3207 East Washington was forfeit

EXHIBIT C

pursuant to A.R.S. § 13-2301 et seq., and A.R.S. § 13-106, and said defendants having been duly served with a copy of the Summons and Complaint, and plaintiff having moved for Partial Summary Judgment pursuant to Rule 56, Arizona Rules of Civil Procedure; the Court makes the following findings of fact and conclusions of law and enters the following orders:

I. FINDINGS OF FACT

A. General.

1. Plaintiff State of Arizona has filed an action alleging acts of racketeering as defined in A.R.S. § 13-2301(D)(4) and violations of A.R.S. § 13-2312, and seeking the remedies provided in A.R.S. § 13-2314 in behalf of those persons injured and to prevent, restrain or remedy racketeering as defined by A.R.S. § 13-2301(D)(4) and violations of A.R.S. § 13-2312.

2. Plaintiff also filed several criminal actions against defendant Joseph Frank Tocco alleging numerous crimes described in

A.R.S. § 13-2301(D)(4) and criminal violation of A.R.S. § 13-2312, each filed in Maricopa County Superior Court, numbered CR-129027, CR-131139, CR-132559 and CR-136709.

3. On November 14, 1983, Joseph Frank Tocco entered guilty pleas in CR-129027, CR-131139, CR-132559 and CR-136709 before Judge Robert Hertzberg, pleading guilty to nineteen (19) felony offenses, including offenses listed in A.R.S. § 13-2301(D)(4) and criminal violations of A.R.S. § 13-2312.

4. On August 29, 1984, judgments of guilt and sentences were entered against Joseph Frank Tocco in CR-129027, CR-131139, CR-132559 and CR-136709 before Judge John Seidel.

B. Particular Facts.

The conduct alleged in the portions of CR-129027, CR-131139, CR-132559 and CR-136709 to which Joseph Frank Tocco pled guilty and upon which judgments of guilt were entered are as follows:

1. Between April, 1981 and December, 1981, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, illegally conducted or participated through acts of racketeering in the conduct of the affairs of an enterprise, with which he was employed or associated to wit: a group of persons associated in fact consisting of Joseph Tocco and Philip Frustino among others engaged in the provision of prostitution and modeling services at the Bird Cage Nude Modeling Studio (hereinafter the Bird Cage) at 3207 E. Washington, Phoenix, Arizona. JOSEPH FRANK TOCCO committed acts for financial gain that are chargeable or indictable under the laws of the State of Arizona and punishable by imprisonment for more than one year, involving one or more of the following: Prostitution, to wit: Pandering, in violation of A.R.S. § 13-3209, and Receiving the Earnings of a Prostitute, A.R.S. § 13-2304, all in violation of A.R.S. § 13-2312

and 13-2301.

2. Between April, 1981, and December, 1981, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, with the intent to promote or aid the commission of an offense, to wit, Pandering, A.R.S. § 13-3209, and Receiving the Earnings of a Prostitute, A.R.S. § 13-3204 involving the Bird Cage, 3207 E. Washington, Phoenix, Arizona, agreed with Philip P. Frustino that one of them or another person would engage in conduct constituting the above-stated offenses in violation of A.R.S. §§ 13-3209, 13-3204.

In furtherance of and to effect the object of the aforesaid conspiracy, JOSEPH FRANK TOCCO and Philip P. Frustino performed one or more of the following overt acts:

(1) In or about April, 1981, JOSEPH FRANK TOCCO as lessor permitted Philip P. Frustino to sublease the premises at 3207 E. Washington from lessees John Luciano and William Terranova for the

purpose of managing the business known as the Bird Cage.

(2) In or about September, 1981, Philip P. Frustino attempted to hire Officer Terry Kerasek to work as a prostitute at the Bird Cage.

(3) Between April, 1981 and December, 1981, Philip P. Frustino hired females to work as prostitutes at the Bird Cage.

(4) In or about October, 1981, Philip P. Frustino hired Louise A. Kanayan-Boone to work as a prostitute at the Bird Cage.

(5) In or about October, 1981, JOSEPH FRANK TOCCO, and Philip P. Frustino met at the Desert Rose Motel (Restaurant) and divided proceeds of the Bird Cage.

(6) In or about October and November, 1981, JOSEPH FRANK TOCCO visited the Bird Cage almost daily, and gave advice on the day-to-day operation of the business to Philip Frustino including advice to Philip Frustino on how to

avoid detection by law enforcement authorities.

(7) In or about November and December, 1981, JOSEPH FRANK TOCCO met Philip P. Frustino on approximately ten to twelve occasions and divided proceeds of the Bird Cage, all in violation of A.R.S. § 13-1003.

3. On or about November 11, 1981, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, knowingly attempted by means of intimidation or force or threats of force to obstruct, delay, or prevent the communication of information or testimony of Robin Michel and Cindy Burris to a peace officer, magistrate or prosecutor relating to a violation by Philip P. Frustino of a criminal statute, to wit: Pandering, A.R.S. § 13-3209, or knowingly injured Robin Michel or Cindy Burris in their persons or property on account of the giving by Robin Michel and Cindy Burris of information to Officer Dan Ray of the Phoenix

Police Department relating to a violation by Philip R. Frustino of a criminal statute, to wit: Pandering, A.R.S. § 13-3209, all in violation of A.R.S. § 13-2409.

4. On or about December 28, 1981, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, knowingly attempted by means of bribery to obstruct or prevent the communication of information or testimony relating to the violation by JOSEPH FRANK TOCCO of a criminal statute, to wit, Obstructing Criminal Investigations or Prosecutions, A.R.S. § 13-2409, to a peace officer, magistrate or prosecutor by sending Randall Phillips money, in violation of A.R.S. § 13-2409.

5. Between January, 1982 and May, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO illegally conducted or participated through acts of racketeering in the conduct of the affairs of an enterprise with which he was employed or associated, to wit: a group of persons associated in fact con-

sisting of Joseph Tocco, Sam Garee, Louise Boone and Ignatius Faulisi among others engaged in the provision of prostitution and modeling services at "Roxann's Models", 109 S. Perry Lane, Tempe, Arizona. JOSEPH FRANK TOCCO committed acts for financial gain that are chargeable or indictable under the laws of the State of Arizona and punishable by imprisonment for more than one year, involving one or more of the following: Prostitution, to wit: Pandering, in violation of A.R.S. § 13-3209 and receiving the Earnings of a Prostitute, A.R.S. § 13-3204, all in violation of A.R.S. §§ 13-2312 and 13-2301.

6. Between December, 1981, and May, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, with the intent to promote or aid the commission of an offense, to wit: Pandering, A.R.S. § 13-3209, and Receiving the Earnings of a Prostitute, A.R.S. § 13-3204, involving Roxann's Models, 109 S. Perry Lane, Tempe, Arizona, agreed with Samuel Garee, and

Louise A. Kanayan-Boone that one of them or another person would engage in conduct constituting the above-stated offenses in violation of A.R.S. §§ 13-3209, 13-3204.

In furtherance of and to effectuate the object of the aforesaid conspiracy, JOSEPH FRANK TOCCO, Samuel Garee and Louise A. Kanayan-Boone performed one or more of the following overt acts:

(1) In or about December, 1981, JOSEPH FRANK TOCCO met with Sam Garee and directed Sam Garee to look for a location to operate Roxann's Models.

(2) In or about December, 1981, and January, 1982, JOSEPH FRANK TOCCO met Sam Garee and Louise A. Kanayan-Boone, discussed opening Roxann's Models, directed that Louise A. Kanayan-Boone would run the day-to-day operations of Roxann's and that all utilities would be placed in her name.

(3) On or about January 11, 1982,

JOSEPH FRANK TOCCO paid Sam Garee half of the deposit for the partial sublease of 109 S. Perry Lane, Tempe, Arizona as Roxann's Models.

(4) On or about January 11, 1982, JOSEPH FRANK TOCCO, directed Sam Garee to negotiate with Halie Burdin for the sublease of 109 S. Perry Lane, Tempe, Arizona.

(5) On or about January 11, 1982, Louise A. Kanayan-Boone wrote a check for $250 to Hallie Burdin to acquire the sublease for 109 S. Perry Lane, Tempe, Arizona.

(6) On or about January 11, 1982, Louise A. Kanayan-Boone signed a partial sublease for 109 S. Perry Lane, Tempe, Arizona.

(7) On or about January 14, 1982, Louise A. Kanayan-Boone signed a receipt for electrical service from Salt River Project for 109 S. Perry Lane, Tempe, Arizona.

(8) On or about January 21, 1982, JOSEPH FRANK TOCCO told Louise A. Kanayan-Boone to hire Patricia O'Farrill, and Nancy Stook to work at Roxann's Models.

(9) On or between January, 1982 and May, 1982, JOSEPH FRANK TOCCO met Sam Garee daily and divided the proceeds of Roxann's Models with him.

(10) In or about January, 1982, JOSEPH FRANK TOCCO brought Cheryl Prather to Roxann's Models and instructed Louise A. Kanayan-Boone to hire her, all in violation of A.R.S. § 13-1003.

7. In or about February, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, caused Louise A. Kanayan-Boone and Sam Garee to file a false Arizona Sales Tax Monthly Report for Roxann's Models, 109 S. Perry Lane, Tempe, Arizona. JOSEPH FRANK TOCCO directed Louise A. Kanayan-Boone and Sam Garee to list $1,700 or $1,800 as the gross receipts for Roxann's Models on the

monthly report, when at the time JOSEPH FRANK TOCCO knew that the actual gross receipts for the period stated were approximately four times higher than the false figure, all in violation of A.R.S. § 42-1332.

8. Beginning in or about January, 1982, and continuing until February, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, with the intent to promote or aid the commission of an offense, to wit, Fraudulent Schemes and Artifices, Wilful Concealment, A.R.S. § 13-2311, and Filing False Sales Tax Monthly Reports, A.R.S. § 42-1332, in connection with Roxann's Models, 109 S. Perry Lane, Tempe, Arizona, agreed with Sam Garee and Louise A. Kanayan-Boone, Ignatius Faulisi and Frank Faulisi that one of them or another person would engage in the conduct constituting the above-stated offenses in violation of A.R.S. §§ 13-2311, 42-1332.

In furtherance of and to effect the object of the aforesaid conspiracy, JOSEPH

FRANK TOCCO, Ignatius Faulisi, Frank Faulisi, Sam Garee and Louise A. Kanayan-Boone performed one or more of the following overt acts:

(1) In or about January, 1982, JOSEPH FRANK TOCCO directed Sam Garee and Louise A. Kanayan-Boone to list Louise A. Kanayan-Boone as the owner of Roxann's Models on a Transaction Privilege License Application, when in fact they knew that JOSEPH FRANK TOCCO and Sam Garee were the owners of Roxann's Models.

(2) In or about January, 1981, Louise A. Kanayan-Boone filled out a Transaction Privilege License application for Roxann's Models.

(3) In or about February, 1982, JOSEPH FRANK TOCCO met with Ignatius Faulisi, and Sam Garee and discussed using Frank Faulisi to sign another Transaction Privilege License application for Roxann's Models.

(4) On or about February 11, 1982, Frank Faulisi signed a Transaction Privilege License application as the purported owner of Roxann's Models.

(5) On or about February 12, 1982, JOSEPH FRANK TOCCO met with Sam Garee and approved the payment of $100/month to Frank Faulisi for the use of his name on the Transaction Privilege License.

(6) In or about February, 1982, Sam Garee filled out a monthly sales tax report for Roxann's Models.

(7) On or about February 12, 1982, JOSEPH FRANK TOCCO met with Sam Garee and discussed what figure to put down on the State Sales Tax Monthly report as gross receipts for Roxann's Models, 109 S. Perry Lane, Tempe, Arizona, all in violation of A.R.S. § 13-1003.

9. On or about March 20, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO, with the intent to promote or aid the

commission of an offense, to wit: Robbery, A.R.S. § 13-1902, agreed with Ignatius Faulisi, Jim Atkinson and Henry Geisler that one of them or another person would engage in conduct, to wit: follow Leslie Charles from Phoenix, Arizona and rob her of gold, which conduct constitutes the above-stated offense in violation of A.R.S. § 13-1902.

In furtherance of and to effect the object of the aforesaid conspiracy, JOSEPH FRANK TOCCO, Ignatius Faulisi, Jim Atkinson and Henry Geisler performed one or more of the following overt acts:

(1) On or about March 20, 1982, Ignatius Faulisi, Jim Atkinson and Henry Geisler followed Leslie Charles' van to the Gold Dome Mining Co. offices in Phoenix, Arizona and remained there during the night watching Charles' van.

(2) On or about April 9, 1982, Sam Garee spoke with John Corzan about Corzan having obtained a license plate

check on the license number of a woman's vehicle. Corzan reported the woman's name and address and Sam Garee told Joseph Tocco of the information.

(3) On or about March 21, 1982, JOSEPH TOCCO, Ignatius Faulisi, Jim Atkinson, and Henry Geisler met in Ignatius Faulisi's room in the Aloha Motel, all the men reported to JOSEPH TOCCO on the progress of their stake out, and discussed a plan to rob Leslie Charles.

(4) On or about March 21, 1982, Ignatius Faulisi purchased walkie-talkies to be used in the robbery of Leslie Charles.

(5) On or about March 21, 1982, Henry Geisler and Jim Atkinson left Phoenix, Arizona in Jim Atkinson's Cadillac to follow Leslie Charles.

(6) On or about March 21, 1982, Jim Atkinson followed Leslie Charles to Gila Bend, Arizona, all in violation

of A.R.S. § 13-1003.

10. Between September, 1981 and April, 1982, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO illegally conducted or participated through acts of racketeering in the conduct of the affairs of an enterprise with which he was employed or associated, to wit: a group of persons associated in fact consisting of JOSEPH FRANK TOCCO, Philip Frustino, Samuel Garee, Beverly D'Andrea and Michael Malucci among others, provided money lending services in and from Arizona. JOSEPH FRANK TOCCO committed acts for financial gain that are chargeable or indictable under the laws of the State of Arizona, and punishable by imprisonment for more than one year, involving one or more of the following: Usury, A.R.S. § 13-2208, and Extortionate Extensions of Credit, A.R.S. §§ 13-2302, 13-2303, 13-2304.

Between September, 1981 and April, 1982, JOSEPH FRANK TOCCO, committed acts for

financial gain that are chargeable or indictable under the laws of the State of Arizona and punishable by imprisonment for more than one year involving usury in that he knowingly engaged in or directly or indirectly provided financing for the business of making a loan at a higher rate of interest or consideration than authorized by law to various individuals including William Jacox, Lucille Sheridan, Tresa Olea, and Houston Turner.

Between September, 1981, and April, 1982, JOSEPH FRANK TOCCO committed an act for financial gain which is chargeable or indictable under the laws of the state in which the act occurred, to wit: Arizona, and punishable by imprisonment for more than one year, involving extortionate extensions of credit in that he knowingly advanced money or property to Philip Frustino with reasonable grounds to believe that it was the intention of Philip Frustino to use the money or property so advanced, directly or indirectly, for the purpose of

making extortionate extension of credit, in violation of A.R.S. § 13-2312 and 13-2301.

11. On or between April, 1981 and June, 1981, in Maricopa County, State of Arizona, JOSEPH FRANK TOCCO with the intent to promote or aid the commission of an offense, to wit, Burglary, A.R.S. § 13-1507 and Theft, A.R.S. § 13-1802 agreed with Harry Thomas Martin a/k/a Dirty Harry, Bernard Woofter a/k/a Catman, Roy Romano, and Sam Garee that one of them or another person would engage in conduct constituting the above-stated offenses in violation of A.R.S. §§ 13-1507 and 13-1802.

In furtherance of and to effect the object of the aforesaid conspiracy, JOSEPH FRANK TOCCO, Harry Thomas Martin, Bernard Woofter and Sam Garee performed one or more of the following overt acts:

(1) In or about April, 1981, JOSEPH FRANK TOCCO met with Harry Thomas Martin, Bernard Woofter and Roy Romano and told Martin and Woofter to go to El Paso,

Texas and contact Sam Garee.

(2) In or about April, 1981, Harry Martin and Bernard Woofter met Roy Romano and got $300 expense money from him for the trip to El Paso, Texas.

(3) In or about April, 1981, Harry Martin and Bernard Woofter traveled to El Paso, Texas from Phoenix, Arizona.

(4) In or about April, 1981, Harry Martin and Bernard Woofter met with Sam Garee and discussed the location of a storage locker that contained property of Tony DeSantis.

(5) In or about April, 1981, Harry Martin, and Bernard Woofter traveled to Phoenix, Arizona from El Paso, to Texas with three boxes of pills, including qualudes and "black beauties."

(6) In or about April, 1981, Harry Martin and Bernard Woofter met Roy Romano in Phoenix, Arizona and Roy Romano sampled the pills.

(7) In or about April, 1981, Harry Martin and Bernard Woofter went to a trailer on Van Buren, bagged the pills and stored them in a sewer under the trailer.

(8) In or about April, 1981, Bernard Woofter and Harry Martin delivered the pills to Harry Barton at Dirty Harry's Bar. Bernard Woofter was paid approximately $5,000 as a partial payment on the pills by Harry Barton.

(9) In or about April, 1981, Bernard Woofter gave Sam Garee approximately $2,000 as partial proceeds to be delivered to JOSEPH FRANK TOCCO. Sam Garee delivered the money to JOSEPH FRANK TOCCO as his cut of the stolen property, all in violation of A.R.S. § 13-1003.

(CR-131139)

12. In Maricopa County, Arizona, between January 1, 1975, and February 14, 1979, DANIEL R. SOLOMON, JOSEPH FRANK TOCCO, JOEL

JACOB PUGATCH and ROY ROMANO with the intent to commit or have another commit action constituting theft by false pretenses, a felony, conspired with each other to engate in or cause the commission of theft by false pretenses and, in furtherance of the commission of said felony, the following overt acts were committed:

(1) On or about January 13, 1975, SOLOMON, on behalf of Central Indian Art Gallery, a corporation, located at 1506 North Central Avenue, Phoenix, Arizona, maintained an insurance policy with Jewelers Mutual Insurance Company which policy insured certain jewelry in said corporation's place of business at the foregoing address. SOLOMON was, at the time, a shareholder, officer and director of said corporation.

(2) On or about January 13, 1975, TOCCO, PUGATCH and ROMANO met at TOCCO's place of business in Phoenix, Arizona. TOCCO and PUGATCH advised

ROMANO that they had a job for him to help with and that the job entailed staging a robbery of a jewelry store. They stated that it was a "set-up" and TOCCO provided ROMANO with a hat and a wig to wear as a disguise.

(3) On or about January 13, 1975, PUGATCH and ROMANO drove to the vicinity of Central Indian Art Galleries at 1506 North Central Avenue, Phoenix, Arizona. PUGATCH and ROMANO then walked to Central Indian Art Gallery.

(4) On January 13, 1975, with the aid and consent of SOLOMON, PUGATCH and ROMANO removed a quantity of jewelry from said Central Indian Art Gallery.

(5) On January 13, 1975, PUGATCH and ROMANO returned with said jewelry to TOCCO's place of business and placed the jewelry in the attic at said location.

(6) On January 13, 1975, SOLOMON

falsely reported said incident as an armed robbery to members of the Phoenix Police Department.

(7) On or about January 15, 1975, SOLOMON, on behalf of Central Indian Art Gallery, gave a false statement to A. A. Quinn of Jewelers Mutual Insurance Company in which statement SOLOMON described the incident as an armed robbery.

(8) On July 20, 1977, SOLOMON, in a sworn deposition, again falsely described the incident of January 13, 1975, as an armed robbery.

(9) On August 15, 1977, SOLOMON, in a sworn affidavit, falsely stated that three men unknown to him armed with guns robbed the store of jewels and jewelry on January 13, 1975.

(10) On January 17, 1979, SOLOMON executed a sworn Release of All Claims as to Jewelers Mutual Insurance Company in Consideration of the receipt by SOLOMON

of the sum of $45,000 paid to SOLOMON on behalf of Central Art Galleries by Jewelers Mutual Insurance Company.

(11) Between January 25, 1979, and February 14, 1979, SOLOMON endorsed a $45,000 draft from Jewelers Mutual Insurance Company on behalf of Central Indian Art Gallery, all in violation of A.R.S. § 13-331(B), 13-661(A)(3) & (B), 13-663(A)(1), 13-671(A), 13-137, 13-138, 13-139, 13-140, 13-141, and 13-142 (Old Code).

13. In Maricopa County, Arizona, between January 1, 1975, and February 14, 1979, DANIEL R. SOLOMON, JOSEPH FRANK TOCCO and JOEL JACOB PUGATCH, aka J. J. PUGATCH, with the intent to defraud, knowingly and designingly by false or fraudulent representation or pretense as to a past fact defrauded Jewelers Mutual Insurance Company of money in the sum of $45,000.00 which company believed said false

or fraudulent representation or pretense and parted with said money in reliance thereon, all in violation of A.R.S. §§ 13-661(A)(3) & (B), 13-663(A)(1), 13-671(A), 13-137, 13-138, 13-139, 13-140, 13-141 and 13-142 (Old Code).

(CR-132559)

14. In Maricopa county, Arizona, between September 9, 1982, and January 31, 1983, WALTER DeBONTE and JOSEPH FRANK TOCCO with the intent to promote or aid the commission of an offense, to-wit: Theft, agreed with Roy Romano that at lease one of them or another would engage in conduct constituting the offense of Theft, A.R.S. § 13-1802 (A)(3) and Walter DeBonte committed the following overt acts:

(1) On September 15, 1982, DeBONTE told Officer Richard Allen of the Phoenix, Police Department that DeBONTE's Bobcat front end loader was missing and that DeBONTE did not have any idea who took it;

(2) On January 20, 1983, DeBONTE signed a false sworn statement in proof of loss in support of his claim for an insurance payment to him by Fireman's Fund Insurance, all in violation of A.R.S. §§ 13-1003, 13-1802(A)(3) and 13-1801.

15. In Maricopa County, Arizona, on or between September 10, 1982, and January 27, 1983, WALTER DeBONTE and JOSEPH FRANK TOCCO, knowingly obtained, by means of a material misrepresentation, property or services of Fireman's Fund Insurance, a corporation, to-wit: money in the sum of $46,118.30, of a value of one thousand dollars or more, with the intent to deprive Fireman's Fund Insurance, a corporation, of such property or services, in violation of A.R.S. §§ 13-1302 (A)(3) and 13-1801.

(CR-136709)

16. In Maricopa County, Arizona, JOSEPH FRANK TOCCO, on or about the 7th day of November, 1982, threatened ROY ROMANO, or

offered, conferred or agreed to confer a benefit upon him, with intent to influence the testimony of ROY ROMANO, in violation of A.R.S. § 13-2802.

17. In Maricopa County, Arizona, JOSEPH FRANK TOCCO, on or about the 7th day of November, 1982, knowingly induced ROY ROMANO to unlawfully withhold any testimony, in violation of A.R.S. §§ 13-2804.

18. In Maricopa County, Arizona, JOSEPH FRANK TOCCO, between February 14, 1983, and March 1, 1983, threatened HENRY GEISLER, or offered, conferred or agreed to confer a benefit upon him, with intent to influence the testimony of HENRY GEISLER, or induce HENRY GEISLER to absent himself from any official proceeding to which he had been legally summoned, in violation of A.R.S. § 13-2802.

19. In Maricopa County, Arizona, JOSEPH FRANK TOCCO, between February 14, 1983, and March 1, 1983, knowingly induced HENRY GEISLER

to unlawfully withhold any testimony, or absent himself from any official proceeding to which he was legally summoned, in violation of A.R.S. § 13-2804.

20. All of the above facts were established as a result of prosecution and investigation done by agents and employees of the State of Arizona and of Maricopa County.

21. The property in Appendix One to the Complaint and to this Order, 3207 East Washington, afforded a source of influence over the prostitution and lending enterprises located there, both of which enterprises Joseph Frank Tocco conducted or participated in the conduct of in violation of A.R.S. § 13-2312.

22. The property in Appendix One to the Complaint and to this Order, 3207 East Washington, was used to facilitate the commission of offenses listed in A.R.S. § 13-2301(D)(4), particularly A.R.S. §§ 13-3209 and 13-3204 (prostitution) and A.R.S. §§ 13-2302, 13-2303 and 13-2304 (making and financing extortionate

extensions of credit and collection extensions of credit by extortionate means).

II. CONCLUSIONS OF LAW

A. General Conclusions.

1. The Court has jurisdiction in this action over Joseph Frank Tocco and over the real estate listed in Appendix 1 to the Complaint and to this Order.

2. A prior criminal conviction works as estoppel in favor of the government in a subsequent civil proceeding.

3. The factual assertions of the plaintiff of prior criminal judgments as to the matters set forth in IB above are uncontroverted by any properly alleged fact.

4. Defendant Joseph Frank Tocco, by the application of the general law of collateral estoppel and also by the application of A.R.S. § 13-2314(F), is estopped from denying in this action any of the essential allegations of the criminal offenses of which he has been convicted in CR-129027, CR-131139,

CR-132559 and/or CR-136709.

5. A.R.S. § 13-2314(F) does not deny due process of law as an impermissible "irrebuttable presumption".

6. A.R.S. § 13-2314(F) is not susceptible to being declared void for vagueness for its use of the term "essential allegations".

7. Each of the issues of fact or law necessarily determined by the judgments in CR-129027, CR-131139, CR-132559 and/or CR-136709 are determined in favor of the plaintiff in this action.

8. Joseph Frank Tocco is therefore adjudged to have committed each element of each offense he was found guilty of in the above actions, in the manner set forth in part IB above, and as to acts done in furtherance of the offense by co-conspirators or co-participants in illegal enterprises he is responsible as though he had done them himself.

9. The effect of Joseph Frank Tocco's

joint and several responsibility in this action for such conduct is as set forth in the following Order.

a) he is liable for all injury to any person's person, business or property caused by any act described in part IB above, in an amount treble the actual damages, A.R.S. § 13-2314(D)(4); and

b) he is additionally liable for an amount equal to the gain (i.e., gross proceeds) acquired or maintained through any act described in part IB above, A.R.S. § 13-2314(D)(7); and

c) he is liable for all costs and expenses of the investigation and prosecution of the acts described in the plea agreements and documents made part of them as parts of the pleas, including reasonable attorneys' fees, costs and expenses for court reporting service, photocopying expenses, recording fees, certified copy fees, service of process

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fees, travel expenses, investigations' expenses, consultant and expert fees, A.R.S. §§ 13-2314(A) and (D)(5), 13-2314.01 and 12-332.

(i) ~~Eighty-five dollars ($85) per~~ attorney hour is a reasonable attorneys' fee to be awarded to the Offices of the Attorney General and of the Maricopa County Attorney for the performance of investigation and prosecution of these criminal and civil actions.

(ii) Twenty-five dollars ($25) per investigator hour is a reasonable investigations' fee to be awarded to the Offices of the Attorney General, the Department of Public Safety, the Maricopa County Sheriff's Office and to any other investigative agency operating on their behalf, in the investigation and prosecution of ~~these criminal and civil actions.~~*

* as crossed out by the Court.

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d) any property affording a source of influence over any enterprises which a person has conducted or participated in the conduct of in violation of A.R.S. § 13-2312 is forfeit to the State pursuant to A.R.S. § 13-2314(D)(6)(b), (E)(2), 13-106; and

e) anything of value used or intended to be used to facilitate commission of an offense listed in A.R.S. § 13-2301 (D)(4) is forfeit to the State pursuant to A.R.S. § 13-2314 (D)(6)(c), (E)(3), 13-106; and

f) Amounts received by the plaintiff on its own behalf or on behalf of victims as payment on the above claims from any person liable thereon shall reduce the obligation of Joseph Frank Tocco on such claim in like amount because he is jointly and severally liable with other persons liable thereon.

10. Rule 56(d), Arizona Rules of Civil

Procedure requires a determination of the "extent to which the amount of damages or other relief is not in controversy" under the pleadings and evidence submitted, and the evidence indicates that at least two minimum amounts are not in controversy:

a) Jewelers' Mutual Insurance Company was damaged, and Tocco gained, by its payment of $45,000, as determined in CR-131139, and

b) Fireman's Fund Insurance Company was damaged, and Tocco gained, by its payment of $46,118.30, as determined in CR-132559.

III. ORDER

NOW, THEREFORE, IT IS ORDERED:

1. Judgment is entered against Joseph Frank Tocco in the amount of $135,000 which shall be paid to the Office of the Attorney General for the benefit of Jeweler's Mutual Insurance Company as treble the damages proven to date resulting from the conduct in part IB

12. and 13. above.

2. Judgment is entered against Joseph Frank Tocco in the amount of $138,354.90 which shall be paid to the Office of the Attorney General for the benefit of Fireman's Fund Insurance Company as treble the damages proven to date resulting from the conduct in part IB 14. and 15. above.

3. The property described in Appendix One hereto is forfeit and shall be conveyed to the State of Arizona pursuant to A.R.S. § 13-2314(D)(6)(b) and (c), (E)(2) and (3), 13-106, and 33-456.

4. Pursuant to Rule 54(b) of Arizona Rules of Civil Procedure, the Court has determined that there is no just reason for delay and it is therefore directed that judgment as provided herein above shall be entered forthwith.

5. Joseph Frank Tocco is ordered, adjudged and decreed jointly and severally liable for an amount equal to the gross

proceeds of each of the acts described in section IB above, which shall be paid to the general fund of the State of Arizona. The amount of such gross proceeds (gain) is to be established by the plaintiff hereafter.

6. Joseph Frank Tocco is ordered, adjudged and decreed jointly and severally liable for all of the expenses of criminal and civil investigation and prosecution of the acts described in Appendix Two hereto, the plea agreements in CR-127029, CR-131139, CR-132559 and CR-136709 and appendices thereto, which have been incurred by the State, by Maricopa County, or by their agents. Said amount shall be paid to the Attorney General's Anti-Racketeering Revolving Fund established pursuant to A.R.S. § 13-2314.01. The amount of such expenses, including attorneys' fees, shall be established by the plaintiff hereafter, ~~and shall be calculated at the rate of eighty-five dollars ($85) per attorney hour and twenty-five dollars ($25)~~

~~per investigator hour~~.* Upon receipt of funds pursuant to this paragraph, the Attorney General shall transfer amounts attributable at its discretion, to Maricopa County expenses, including its attorneys' fees, to the Maricopa County Anti-Racketeering Fund, account number 750.

~~7. In order to effectuate paragraph 5,~~ of this Order, Joseph Frank Tocco shall submit the Judge currently assigned this case** to/~~this Court~~ within ninety (90) days of the entry of this Order a complete and detailed accounting of each of the sources and applications of all funds, property and things of value to or by himself and those persons or entities conducted or controlled by himself or his spouse, the Bird Cage Nude Modeling Studio, Roxann's Models, and JBT Enterprises, separately calculated for each year from 1970 to the present. Said accounting shall be prepared ~~by a qualified CPA after thorough audit~~

* As crossed out by the Court.
** As crossed out and written in by the Court.

and shall be certified by its preparer to conform with generally accepted auditing standards and accounting principles. Joseph Frank Tocco, his agents, employees, attorneys, successors and assigns, shall cooperate in producing and explaining all necessary data and documentation for said accounting, as shall the State of Arizona and all parties to this action to the extent that they have possession of documents relating to Tocco, his spouse, the Bird Cage Nude Modeling Studio, Roxann's Models or JBT Enterprises, or documents otherwise necessary for a full and detailed accounting.

Joseph Frank Tocco shall engage and pay a qualified CPA to prepare this accounting within fifteen (15) days of the entry of this Order.

If Joseph Frank Tocco has not engaged and paid a qualified CPA within the time allotted, the Attorney General shall engage such person from within or without government employment and shall add the expenses so

~~incurred to the expenses ordered paid in paragraph 6 of this Order.~~ *

8. The above order to pay treble damages is without prejudice to the plaintiff's claim that greater and additional damages and gain resulted from the same and other conduct.

DATED this 9 day of ~~June~~ Sept.**, 1985.

/s/ Edward C. Voss

HONORABLE EDWARD C. VOSS
Judge of the Superior Court

* As crossed out by the Court.
** As written in by the Court.